THE UNIFORM BILL OF LADING

Business blanks or forms arise to facilitate complex business activities. The more complex, the more far-reaching, and the more impersonal the business activity, the greater the need for these commercial instruments. And the greater the need for forms, the more urgent the demand that they be standardized and uniform. It is natural, therefore, that with the rapid extension of the railway business there should have been an equally rapid multiplication of forms, and then that a movement should gain headway to make the forms of standard, uniform character.

Among these multifarious business forms used by the railroads is the bill of lading. This is a very important instrument now and has manifold possibilities for future development. It has been estimated that annually "there is about $25,000,000,000 worth of business handled through bills of lading, and of that, $5,000,000,000 is handled by the banks."[1] There is no wonder, then, that much concern is felt about the liabilities and conditions connected with it. What kind of an instrument this bill of lading is, what functions it performs as a commercial document, what steps have been taken to safeguard it and to make it uniform, and under what conditions and regulations it moves today will be the subjects of this discussion.

I

The bill of lading originated from the old ship "register," in which was entered the character and amount of goods delivered. This record served at first as written evidence of receipt of the goods, and later of the terms of a contract of shipment between the merchant and the master of the ship. "It would seem probable that oral evidence of shipment was replaced by the quasi-official ship's register, which in its turn gave way to the private contract between the individual merchant and the master."[2] It is possible to conceive of the entry in the register as a rudimentary bill of

[1] A. T. Thom, counsel of Southern Railway Co., in Senate Hearings on Bills of Lading, p. 111.

[2] Bennett, *History of the Bill of Lading*, p. 6.

lading. But the need for the development of a separate and distinct document would be felt when the merchants no longer traveled with their goods.[1] When goods are dispatched under a shipment contract, there are three parties to this contract—the shipper, the carrier, and the consignee. Here is ample reason, in "the growing requirements of practical commerce," why the bill of lading should early have been issued in triplicate. Each party vitally concerned in this contract would desire a copy.

Originally transferred, in the United States, from the steamship, canal, and pike-road bill of lading, the railway bill was also at first little more than a certificate of receipt.[2] The numerous conditions which are today encumbering it were formerly printed on the tariff sheets.[3] Originally, also, bills of lading were drafted by each transportation company and very naturally differed "according to local conditions and to legislative enactment in different states."[4] Confusion in requirements resulted, and even the fierce competition between the railway lines that caused rate wars found expression in the stipulations on the bills of lading. Conversely, the development of through freight lines made for "homogeneity in various bills of lading." It was only with the growth of the co-operative idea among the carriers that the problem of a uniform bill came into definition.

The bill of lading, however, should be sharply distinguished from other forms associated with it. The freight bill, or the shipping bill, is a receipt for the goods delivered to the carrier, and nothing more. It is a form developed to fulfil that specialized function out of which the bill of lading grew. The bill of exchange, to which the bill of lading is often attached, is an independent, though an interrelated, document. It represents the banker's function in financing the shipment. Later it will be shown how intimately these two documents are connected; here it suffices to say that the bill of exchange is a business form which facilitates the financing of freight traffic

[1] Bennett, *History of the Bill of Lading*, p. 6.

[2] The history of the bill of lading in the United States has not yet been written. It is the early ambition of the writer to show by a series of forms how the modern bill has been developed. A very interesting collection is being made by the Chicago Traffic Club.

[3] McPherson, *Freight Rates*, p. 188. [4] *Ibid.*

and, when accepted, sloughs off the bill of lading along with the certificate of insurance, the consular invoice, and other documents and stands alone, a complete instrument in itself.

As a mechanism for facilitating the transportation of goods, the bill of lading has three functions to perform. One of these functions is to serve as a receipt, where it duplicates the work of the freight bill. Indeed, it is gradually transplanting that document, just as the check is displacing the formal receipt in general mercantile transactions. A second function is to serve as a written evidence of a contract of shipment between shipper and carrier. A third function is to serve as a document of title to goods. In one or another of these functions the bill of lading meets the needs of the four parties chiefly concerned with a shipment of goods, i.e., the shipper, the carrier, the banker, and the consignee.

These bills of lading also fall into various groups or classes, according as they are looked at from different angles. First, as to kinds of freight, the bills fall into two groups. There are those intended to apply to general merchandise, which may be grouped in one great class. The second kind may be called commodity bills, such as those intended for the conveyance of livestock, grain, cotton, and perishable produce. Again, bills of lading may be classified, on the basis of the maker, into those issued by a firm or corporation or individual—a private bill—and those issued by the carriers themselves. In another way they may be arranged, on the basis of the factors affecting negotiability, into *order* bills and *straight* bills. The former are those which may be transferred by indorsement, the latter are those accompanying goods consigned directly to consignee and are merely consignable. And, finally, on the basis of the "conditions" of the contract of carriage, the stipulations and the limitations of liability, and the agreements with connecting lines, there are the standard (or Revised Standard Bill of the Southern Classification Territory), the uniform, the through and export, and the special bills. The last-named are distinct, as being issued under common-law liability.

The groups are by no means mutually exclusive, but they will serve to identify the problem underlying the uniform bill of lading. Clearly, the first step toward uniformity would have to do with the

bills carrying the great class of general merchandise, and only gradually could the commodity bills be standardized—and only then on a commodity basis, i.e., grain bills would not be uniform with cotton bills or cotton bills with livestock bills. The problem of uniformity is not so vital as regards straight bills as it is respecting order bills, for the reason that uniformity is an essential element of free negotiability. For the same reasons the carrier's bills are of more importance than the private bills. But more important than all is the point that uniformity may apply to two distinct aspects of bills of lading: (1) to the laws under which they operate and (2) to the conditions of the contract which they contain. Early in the movement for uniformity this distinction appeared:

> It was first decided that the law of bills of lading was not the law of carriers. The law of carriers defines the relative rights and duties of shipper and carrier and is fixed by the common law, except as modified by statute. The conditions which you find upon the back of bills of lading do not pertain to the law of bills of lading, but to modifications of the law of carriers as affecting the relations between shipper and carrier. The law of bills of lading, however, properly understood, and as dealt with by the Commission, deals with bills of lading as documents of title and as pieces of commercial paper.[1]

Uniformity in bills of lading therefore may be of two kinds, and one may be secured without the other. The committee on uniform commercial laws may succeed in securing the passage in all states of the Union of the same law under which the carriers are to operate. Such legislation has already become a federal enactment to control interstate commerce and has become a law in fifteen states.[2] On the other hand, the same conditions may be agreed upon as to the contract of shipment on all transportation lines. The ideal to look forward to is this twofold uniformity. It remains to be considered what progress has been made and what is yet to be done.

The question of uniformity resolves itself into an attempt to harmonize the interests of the four parties chiefly concerned in the transportation of commodities. The shipper, in sending forth his goods into distant markets, is desirous of ridding himself as quickly as possible of all responsibility for them and at the same time of being able to realize as quickly as possible on the deal. He is

[1] *American Uniform Commercial Acts*, p. 221.

[2] Hearings, Senate Committee, p. 13. *The Nation's Business*, May, 1916, p. 77.

anxious to have his goods arrive speedily and safely and to have his customer accommodated as completely as possible with as little expense as possible. That is, the shipper insists upon as much service from the carrier as he can get for the transportation charge. Opposed to these interests of the shipper are those of the carrier, who naturally wants to assume as little responsibility as he can. One fundamental issue arises out of this clash of interest—where shall the carrier's duty and liability begin and where shall they end?

On the financial side, too, an issue appears. Here the interests of the shipper, the carrier, and the banker are involved. It has been said that the shipper wants to be able to secure speedy reimbursement. For this he appeals to his banker, who says that he is willing to finance the transaction for a fee, provided his own interests are safeguarded. This means that there must never be any doubt of the documents accompanying the bill of exchange, and this means that always the liability on the bill of lading shall be sure and definite. To what extent, then, can any doubt as to the validity of the bill of lading arise, and what is the status of liability?

As for the consignee, his interests in the bill of lading, while not identical with, aid and abet, those of the shipper. Just as the latter wants the goods delivered so as to accommodate the consignee with least expense, so the consignee wishes to get as much service in addition to his goods as he can. Both shipper and consignee try to shift the burden onto the carrier. In his relations with the banker the consignee again joins with the shipper in asking for financial facilities. Often, of course, the consignee pays the freight, and in such a case becomes the shipper. There is therefore no new issue developed out of these relationships.

Subsidiary to the issues stated above is the relation of the bill of lading to the bill of exchange. To what extent should these documents be independent of one another? How far is the bill of lading collateral security, and how far is it so needed? Is this relationship changed by uniformity, and, if so, how far? These are questions that will come up for answer during the course of analysis. Another group is thus drawn into the discussion—namely, the credit men. Their interests are concentrated on the use of the bill of lading as a credit instrument, and will be taken up in connection with that subject.

II

Since business forms reflect business usage, it follows that they must change with business changes. So long as carrying goods, especially on land, was private business, bills of lading remained also of private concern. It is not to be supposed that the times in which railroads refused to let their cars go on foreign lines, in fact, deliberately "identified" their rolling stock by special gauge of track, in which "for a railroad company to permit its cars to go away from its own tracks would have seemed equivalent to making the other company a present of them,"[1] would make for uniformity of business practice in transportation. Such were the conditions in the decade preceding the Civil War.

But traffic of all kinds outgrew such pettiness. The carrying of troops and government supplies during the war and the extending of mail service quickly showed the inconvenience of unnecessary transfers of all traffic. It was sometimes the practice to lift the body of the car from one set of trucks to another of different gauge in order to obviate the transfer of freight. The day was far spent when such foolish and arbitrary legislation as that which prohibited the Erie Railroad from making connections with any other road, under penalty of forfeiture of charter,[2] would be tolerated. And it was therefore inevitable that such legislation as the Act of 1866 should result. This act stipulated, among other things, that "every railroad company in the United States whose road is operated by steam be, and hereby is, authorized to carry upon and over its road all passengers, troops, government supplies, mails, freight, and property on their way from any state to any other state . . . . and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination."[3] By this permissive enactment the gates were opened for great development. The artificial barriers, such as state lines, private interests, and tariffs, could no longer resist the pressure of traffic movement. Forwarding companies and railroad agreements followed in due course.

[1] McPherson, *op. cit.*, p. 161.

[2] *Ibid.*, p. 162.

[3] Thirty-ninth Congress, First session, chap. cxxiv, p. 66.

The continuous-route idea brought the carriers into contact with each other's methods. As a result the forms and blanks of all kinds passed from hand to hand. It thus came to light that chaos ruled so far as the conditions of the carriers' contracts were concerned, just as in the case of rates charged. In fact, it must be remembered that the "conditions" were first a part of the tariff sheet.

Furthermore, with the rapidly growing importance of the railways and with the increase of their unseemly acts, there was a greatly increased complexity of state regulations. "We have the Federal law and we have the laws of forty-six states. I do not know of any subject of commercial importance upon which there is such a great variety of judicial decisions or greater conflict of authority than upon the question of carrier's liability."[1] It was natural, of course, for these multiform regulations to touch upon the relationship between shipper and carrier. These state statutes were mostly created to modify the common-law liability of the carrier. Sometimes the modification extended the carriers' liability; sometimes it contracted their liability.[2] At any rate, in so far as there was modification at all, the statutes affected the bill of lading. These regulations also left not easily ascertainable the status of the title to goods and interfered with the bill of lading's becoming a more important commercial document.

The movement for uniformity in bills of lading materialized as early as 1889, when certain difficulties in the Trunk Line and Central Traffic Association territories led to the formation of a joint committee. This committee drafted a uniform bill of lading which was adopted on July 1, 1890.[3] So serviceable did the efforts of this committee appear that it was made a permanent institution, and all questions relating to bills of lading were referred to it. The work of the committee resulted in two kinds of bills—the "Ordinary Form of Uniform Bill of Lading" and the "Form of

[1] Martin A. Knapp, chairman, Interstate Commerce Commission, in *American Uniform Commercial Acts*, p. 20.

[2] McPherson, *op. cit.*, pp. 241–43.

[3] A uniform bill of lading has been in use throughout the New England, the Trunk Line, and the Central Traffic Association territories since 1890.

Uniform Bill of Lading at Carrier's Liability." The distinction is as follows:

> In addition to the exemptions from liability by the carrier specified by the common law, the "Ordinary Form of Uniform Bill of Lading" contained certain stipulations as to further exemption; the other, a "Form of Uniform Bill of Lading at Carrier's Liability," provided that the carriers assume all liability, limited only by the common law which frees the carrier in case of loss arising from any of the following causes: first, an act of God or the public enemy; second, inherent defect, quality, or vice of the thing carried; third, seizure under legal process; fourth, any act or omission of the owner of the goods.[1]

The next federal enactment to affect the bill of lading was the Harter act, of 1893. This act provided for extending the liability of common carriers to exporting and to coastwise trade and declared void any contract or agreement contrary to this liability. It declared that it was the duty of "the owner or owners, masters, or agents of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading, or shipping document," etc., for identification of goods and as a receipt (sec. 4). The question of uniformity thereupon touched foreign trade and the through bills of lading used in it.

The matter then drifted along through the period of depression in the nineties and passed over practically unchanged into the new century. In 1904, however, a petition for changes in the bill of lading was made by the Illinois Manufacturers' Association to the Interstate Commerce Commission. The petition originated in certain complaints brought before that Association. This action led on November 21, 1904, to an order for an investigation to be made by the Commission. Hearings on the question lasted for nearly three years. The result was that an order was issued June 27, 1908, recommending a uniform straight, and an order-notify, bill of lading applicable to general merchandise.[2]

These two forms, recommended by the Commission, were identical so far as conditions are concerned, but differed in detail

[1] McPherson, *op. cit.*, pp. 188–89.

[2] Cf. Brief in Behalf of Carriers, October 10, 1916, p. 1; 14 I.C.C.R. 346, *In the Matter of Bills of Lading;* Annual I.C.C.R., 1904, p. 35.

on the front of the forms. Since the conditions of the contract are the battleground of the opposing interests, these two kinds of bills need not be distinguished.

It is to be noted, however, that this phase of the movement for uniformity has to do with what has here been called "the law of carriers as affecting the relations between shipper and carrier." At the same time the other phase, which "deals with bills of lading as documents of title and as pieces of commercial paper," was receiving attention. The American Bar Association at its meeting in 1905 appointed a Commission on Commercial Acts, which in its turn asked Professor Samuel Williston, of the Harvard Law School, to draw up a tentative draft of a uniform bill of lading. This draft was submitted to the Commission the following year, August 23, 1906. Discussion, however, was deferred for one year, and the draft was meanwhile submitted to shippers, bankers, and carriers. At the next meeting of the Bar Association, May 13–14, 1907, the proposed bill was thoroughly discussed, and a second draft was prepared by August 21, 1907. This was also discussed and sent back for changes. A third draft was ready by June 1, 1908, which was presented at a hearing in New York, April 19–20, 1909, as a result of which the Commission approved a revised or fourth draft.[1] "One form recommended is an order bill of lading, printed on yellow paper, 8½ inches long by 11 inches wide, in which the word 'order' will be in print. A straight bill of lading is to be of the same size, printed on white paper."[2]

Meanwhile, however, the Hepburn act of 1906 had passed through the federal Congress and had become a law. It contained in the Carmack, or "first Cummins," amendment a provision affecting the bills of lading. It is therein provided—

> That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it, or by any common carrier, railroad, or transportation company to which such

[1] *American Uniform Commercial Acts*, pp. 22–34, 43, 60, 213.

[2] *Ibid.*, p. 15.

property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.[1]

This means that the initial carrier is responsible for the goods shipped. There is no shifting of responsibility under this act, and the worth of the bill of lading as a negotiable instrument is greatly enhanced.

Progress was thus being made both toward an agreement upon the conditions of contract in the bills of lading and toward uniform laws governing the relationship of shipper and carrier. But the controversy was far from final settlement. For two years longer the movement drifted along, when two important bills reached the Senate Committee on Interstate Commerce, one known as S. 4713 and the other as S. 957. The former was the Stevens-Clapp bill; the latter, the Pomerene bill. A very extended hearing was held covering the dates of February 16, 17, March 1, 2, 15, and April 26, 1912. All of the parties likely to be affected by changes in the bill of lading—the shippers, the carriers, the bankers, the receivers—presented their cases before the Committee at great length. The line of cleavage of interest involved became clear. On one side were ranged the shippers, the bankers, and the receivers; on the other stood the carriers with united front. The result was that the Pomerene bill was voted out, but later failed of passage. And so this great drive for a uniform law was stopped.

In 1915 another amendment was made to the Interstate Commerce Act of 1887, which already resembled Joseph's famous coat. This was the "second Cummins amendment," approved March 4, 1915. By its provisions the amount of damages recoverable on merchandise was the full value of damage or loss, with the exception of those articles where the value is required to be given when goods are received. As a result of this amendment the Interstate Commerce Commission reopened the case for further investigation.

[1] "The effect of the Carmack amendment is to hold initial carriers engaged in interstate commerce and 'receiving property for transportation from a point in one state to a point in another state' as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents. Without the amendment the carrier might elect to carry to destination or to end of line"—*U. S. Compiled Statutes*, VIII (1916), 9298.

"Elaborate hearings have been had at New York, Chicago, San Francisco, New Orleans, Atlanta, and Washington."[1] Briefs have been made out in behalf of the carriers, the National Industrial Traffic League, the Refrigerator Car Lines Committee of the National League of Commission Merchants of the United States, and on behalf of Armour & Co. and Swift & Co. The Interstate Commerce Commission is still busied with the voluminous record of these hearings and the briefs submitted.

The year 1916 saw the conclusion of one phase of this question. The Pomerene bill, which failed of passage in 1912, was revised and revived, and appeared for vote on June 24, 1916, in the House. Here it secured passage, with certain minor amendments, and came once more to the Senate. This body passed it August 18, with the provision that it go into effect on January 1, 1917. It was approved August 29. The passage of this bill "marks the culmination of an effort which has been in process for a good many years."[2]

This bill is an exceedingly important piece of legislation. Its effects will be cumulative and far-reaching. In substance it is a codification of the best common law, with modifications where the law is unsuited to present commercial conditions. In purpose it aims to make the bills of lading more fully negotiable by affording greater protection to discounting bankers and to the buyers of commodities, and to make carriers responsible to bona fide purchasers for value, on bills of lading issued by their agents, whether or not the goods have been received.[3] Greater protection to discounting bankers and to purchasers of commodities can come only by armoring the bill of lading against fraudulent practices. This is accomplished by increasing the responsibility of the carriers. But further than this:

> The Pomerene bill declares fully negotiable all "order" bills and declares void any provision to the contrary; protects goods moving under an order bill from attachment and execution unless the bill itself is surrendered to the railroad or its negotiation enjoined; limits carrier's lien to charges properly made under the contract of carriage; prevents the owner from exercising the right

[1] Cf. Brief on Behalf of National Industrial Traffic League, p. 2.

[2] *Railway Age Gazette*, LX, No. 15, pp. 845–46.

[3] Cf. *The Nation's Business*, May, 1916, p. 77.

of stoppage *in transitu* where he has parted with an order bill; and prescribes just how an order bill may be negotiated, and the effect of such negotiation.[1]

There remains yet to be considered the effect of this bill upon the interests and liabilities of all the parties concerned. Do the responsibilities of carrier and shipper under the law coincide with their functions? Have the obstacles to negotiability of the bills of lading been removed? Is it true in fact that "today a bill of lading is an instrument of credit, ranking on a par with a bill of exchange, and it must be negotiable for the same reasons that forced upon the commercial world and the courts, hundreds of years ago, the ruling that bills of exchange were negotiable"?[2] How far have the conflicting interests involved been harmoniously adjusted?

III

The present importance and the possibilities for further development of the bill of lading have been indicated. In order that it may come fully into its own, the bill must free itself from all stigma, from all manner of doubt as to the liabilities and responsibilities of all parties connected with it. If it moves as it should move, there would be ever behind it a sure and substantial basis of goods on their way to market—the best of all credit risks. It is now proposed to examine with some considerable care this "piece of commercial paper" as it circulates under existing rules, regulations, and uniform federal law. This examination will necessitate a critical glance at the functions and attending responsibilities of the four parties chiefly interested in the bill of lading.

The typical shipper represents the merchant function in modern business. His immediate and ever-present concern is to have his

[1] *The Nation's Business*, May, 1916, p. 17. This measure thus covers four main features, namely, (1) it provides for a liability of the carrier upon bills signed by its agents, although the goods have not been received in whole or in part; (2) it provides for a liability for the negligence of the carrier upon order bills of lading when the goods have been delivered and the bill left outstanding; (3) it provides that altered bills without authority shall be good for their original tenor; and (4) it requires the printing of "order of" on order bills, the omission of the words "not negotiable" from such bills, and the stamping upon straight bills of the words "not negotiable," and provides a liability in damages to anyone suffering from a violation of these provisions (Hearings before Senate Committee on Interstate Commerce, p. 19).

[2] *Ibid.*

goods available for as wide a market as possible at least expense. The common carriers have made possible for him a world-wide market, so that he sells, to buyers whom he has never seen, goods which they have never seen. No matter whether this shipper is large or small, whether he has his own sidetrack or hauls his goods to the freight station, whether he loads his own cars or those of the railroad, he loses control and care of his goods when they start forth on their journey. So dependent has he become upon this common carrier that he feels his responsibility ended when the goods, as ordered, are delivered to the railroad. All that he asks in return is some indubitable evidence to serve as a receipt as to the character and amount of goods shipped, and by means of which he can pass title. The shipper then turns his attention to getting his money out of the deal as soon as he can.

The carrier's function is not a single or a simple one. There are always two phases to his task: he must transport and he must protect; he is a carrier, he is a bailee. From the moment he "receives" the goods he is a warehouseman until he "delivers" them to the receiver. It is well known how this side function arose: it was more economical for the railroads to own and operate their rolling stock and terminal facilities. Obviously, too, a freight car is a movable warehouse, just as a freight depot is a stationary one. It would seem to follow also that responsibility would be extended to keep pace with increasing functions. One test of the responsibility which the carrier has assumed is the facilities with which he has equipped himself. There are, for instance, sidings, platforms, freight sheds, scales, open cars, box cars, special cars, etc. As the carrier has assumed the function of cartage, of delivery, and of warehousing, he must also have assumed their attendant responsibilities.

The ideal of the carrier is to tap every resource and to serve adequately every market. This great task must be done effectively. For its fulfilment there is required a stupendous organization, reaching out its tentacles into every hamlet and village, touching those little pockets of fertile valleys hidden away in the midst of vast mountain systems, serving all races, all climates, in all seasons. It is thus that "transportation becomes the basis of civilization,"

and is a "thing apart" from all other business organizations. So essential has it become that traffic must move, that the Supreme Court was swayed by the force of this practical argument to hold that a railroad organization should not be held responsible for the acts of its agents. The famous Friedlander case in 1888 held the railroads guiltless where the freight agents had signed bills of lading without having received the goods. While doing this, said the Court, the agents were not within the scope of their authority and hence were not really agents of the railway company. In making this decision the Court met a practical difficulty—escaped discouraging the railroads—but laid up in store much trouble for itself and for everyone interested in the bill of lading. But the main point to note is that the carrier's interest tended to become the dominating one.

The typical consignee is the purchaser of goods f.o.b. destination. He has bought goods which he has never seen, from a distant seller whom he may never have seen. His first interest is in the integrity of that distant seller, for he wants to be confident that the goods are of the character and quantity bargained for. He leaves it to the seller to arrange for the arrival of the goods. But from the carrier he expects assurance that the goods are as represented in the bill of lading; he expects a check on the integrity of the seller, for the carrier gives a receipt at the shipping point and therefore has the mechanism for checking this matter up. He will therefore insist that the carrier be held responsible for the face of the bill of lading signed by its agent. Aside from this the consignee expects of the carrier an efficient fulfilment of the carrier function, i.e., the speedy and safe transportation and the prompt notification of arrival of the goods. On his part, too, he must be ready to receive the goods and, when title passes to him with the possession of the bill of lading, to assume his responsibility for them. The point at which this responsibility passes from carrier to consignee must be specifically ascertainable.

The banker enters as financial agent, and with him comes the bill of exchange. His function is to loan money so that the "long-time transaction" may be made. The seller needs quick payment in order that he may carry on business continuously; the buyer may

need to borrow money on the goods sent to be repaid as they are sold. They both look to the banker. For the loan the banker needs security. The mechanism for facilitating the loan is the bill of exchange, and the security is the bill of lading, which carries title to the goods. On a part of the way these two documents go hand in hand; the draft reaches the banker with the bill of lading attached. Here arises one of the issues underlying the whole question of uniformity, as indicated above. Is there ever any doubt of the documents accompanying the bill of exchange?

The adequate reply to this query is the notorious Knight, Yancey & Co. case (209 N.Y. 224). This company had drawn on Springs & Co., New York, for $39,000, as per written agreement, against shipment of 600 bales of cotton. But the bills were forged and the cotton never was shipped. These bills were discounted at the First National Bank of Decatur, Alabama, where Knight, Yancey & Co. were located, and were sent on to the Hanover National Bank, New York, for collection. The latter bank accepted the bills and the documents were detached. In due course of time the forgery was discovered and recovery for the loss was sought. But the Court held that "the attachment of bills of lading to a draft does not make the former a part of the latter; that the one who accepts or pays such a draft must be assumed, in the absence of special circumstances, to do so on the faith of the draft itself, and that reliance upon the bills of lading is not a fact which enters into the substance of the real transaction in accepting or paying the draft, but is an extrinsic fact."[1]

And, if this is not sufficient demonstration, there are the great cotton frauds in which European banks lost millions of dollars through bills of lading being issued without the cotton having been delivered to the railroads. These frauds threw American cotton bills into such disrepute that the International Bankers' Convention, meeting in London, declared they were no longer acceptable without a guaranty from American bankers. These bankers in turn passed the responsibility on to the railroads. Instances might easily be multiplied in shipments of wheat and perishables.[2]

[1] Cf. *Banker's Magazine*, LXXXVIII, 34.

[2] Cf. Senate Hearings, pp. 145–60, 218–26.

Enough has been said, however, to show that, prior to the Pomerene bill at any rate, there was doubt as to the validity of, and the liability on, bills of lading. And the banker, as did the consignee, turned to the carrier for a guaranty.

The crucial point has now been reached. How does the bill of lading, serving in its three capacities—as a receipt for goods, as containing the written conditions of the shipping contract, and as a document of title to goods identified in its descriptive terms—and moving under the provisions of federal and uniform state legislation, meet the requirements of the parties whose functions have been analyzed?

First, then, the bill of lading is to move under the provisions of the Uniform Bill of Lading law, the Pomerene bill, which at present affects all interstate and export traffic, and the intrastate commerce of fifteen states. As a receipt for goods, the bill of lading is made more effective by the provisions of this statute. Section 20 declares that the words "shipper's weight, load, and count" shall not be inserted in the bill of lading, if, as a matter of fact, the carrier did load and had an opportunity to count and weigh. If the words are inserted under these conditions, they are "null and void." Section 21 provides that, if goods are loaded by the shipper, and the goods are described in the bill of lading by "marks, labels, or statement," and if a statement of that tenor in the bill is true in fact, the words "shipper's weight, load, and count" may be inserted with full effect. But even here the carrier is held liable to weigh and count, if the chance to do so is given it. By sec. 22 the carrier is held liable on bills of lading issued by its agents, whether goods have or have not been delivered to the railroad. This provision abrogates the decision of the Supreme Court in the Friedlander case. Under these provisions the face of the bill of lading defines sharply and clearly the parties liable, fraudulent use of the bills has been eliminated, but the possibilities of forgery are left untouched.

As a document containing the conditions of a contract of shipment between the consignor and the carrier, the bill of lading is very considerably affected by the uniform law. The law provides that bills of lading shall not be issued in sets or parts (sec. 4); that

All terms and conditions in the bill of lading shown herein in plain type not underlined are agreed upon between The National Industrial Traffic League and the carriers.

All provisions underlined herein are insisted upon by the carriers but opposed by The National Industrial Traffic League.

All provisions in **bold faced type** are insisted upon by The National Industrial Traffic League and either take the place of matter underlined and immediately preceding the insertion, or are in addition to matter agreed upon between The National Industrial Traffic League and the carriers.

CONDITIONS.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after 48 hours (exclusive of Sundays and legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. **The liability of the carrier as a common carrier shall terminate at such time as is provided or determined by law.** Except in case of negligence of the carrier or party in possession, and the burden to prove freedom from such negligence shall be on the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or from riots or strikes, or for country damage to cotton. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence and the burden to prove freedom from such negligence shall be on the carrier or party in possession. **Property not customarily transported in open cars, when transported in open cars at the request of the shipper, shall be at owner's risk as to loss or damage resulting directly from the use of such open cars, provided such loss or damage could not have been prevented by reasonable care by the carrier or party in possession; provided, further, however, that in case of loss thereof or damage thereto by fire, the liability of the carrier or party in possession shall be the same as if the property had been carried in closed cars, and the burden to prove that the carrier exercised reasonable care shall be upon the carrier.**

In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged; or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur or damages they may be required to pay by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route, the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the actual value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid; and where the actual value of the property has not been required to be specifically stated by the shipper in this bill of lading, such actual value shall be arrived at from the bona fide invoice price, if any, to the consignee: **The amount of any loss or damage to property, or loss or damage due to delay in delivery thereof under this bill of lading for which the carrier is liable by law, shall be the full actual loss, damage or injury, including freight charges, if paid:** *Provided, however,* That if the property is hidden from view and the shipper has specifically stated in this bill of lading the value of the property, no carrier shall be liable beyond the amount so specifically stated, whether or not the loss or damage occurs from negligence: *Provided, further,* In all cases not prohibited by law, that where a lower value than actual value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property, or in case of export traffic, within nine months after delivery at port of export, or in case of failure to make delivery, then within six months, or nine months in case of export traffic, after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided,* That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and prompt notice thereof shall be given to the consignor, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. Property not removed by the party entitled to receive it within 48 hours (exclusive of Sundays and legal holidays), after notice of its arrival has been duly sent or given, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. Nothing in this paragraph shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: *Provided,* That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: *Provided,* That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

Where the said property provided for in this bill of lading is lost or destroyed, resulting in non-delivery of the shipment, the carrier or party in possession shall immediately give notice thereof both to consignor and the consignee. If the property covered by this bill of lading is plainly marked with the name and address of the consignor, or if the carrier's agent at destination has otherwise specific notice thereof in writing, and such property is refused or unclaimed at destination, the carrier or party in possession thereof shall send notice of such refusal or non-claim to the consignor within such time and by such means as may, in the circumstances, be reasonable.

Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: *Provided,* That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered on private or other sidings or on such wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains or until loaded into and after unloaded from vessels.

Sec. 5. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and in such cases the goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading, or in a written order of reconsignment, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 2 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with statute or this section, and subject also to the conditions that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, from any cause whatever, or for any loss or damage resulting from the perils of the lakes, seas, or other waters; or from vermin, leakage, chafing, breakage, heat, cold, frost, wet, or change in weather, or by riots, strikes, stoppage of labor or threatened violence, or delay caused by stress of weather, or causes the carrier's control, explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing; or unseaworthiness; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, to tranship, to lighter, to load and discharge goods at any time, and assist vessels in distress and to deviate for the purpose of saving life or property, or for docking and for repairs. Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

If the shipowner shall have complied with the provisions of section 3 of the Harter Act, it is hereby agreed that the owners or consignees of the cargo shall contribute with the shipowner in general average, and shall pay any salvage or special charges incurred, even though the necessity for the sacrifice or expenditure was brought about by fault in navigation or management of the ship.

If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors when performed by or on behalf of the rail carrier. **The transportation of any property under the terms of this bill, by lighter, car float, or car ferry, in or across rivers, harbors or lakes, shall be deemed to be transportation by rail."**

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(*) Note.—The two paragraphs here referred to are the two last preceding paragraphs in plain type, not including the paragraph in bold faced type.

"duplicate" shall be written on order bills when they are so in fact (sec. 5); that delivery is legal only as stipulated in sec. 8; that the carrier is responsible for wrongful delivery (sec. 10), for failure to cancel an order bill (sec. 11), for full delivery of goods (sec. 12); that in case of any alteration being made in the terms of the bill of lading the contract holds according to the original tenor (sec. 13); and that the transferor warrants (*a*) that the bill is genuine, (*b*) that he has a legal right to it, (*c*) that he has no knowledge of fact that would impair it, and (*d*) that he has the right to transfer title to the goods (sec. 34). The "conditions" in the bill of lading must come within the limitations indicated, and in so far every holder may know his rights. And once more the tendency has been to broaden the scope of the duties and liabilities of the carriers.

As a document of title to goods the bill of lading is also regulated by the Pomerene law. In this respect the law provides that "non-negotiable" shall be written on straight bills (sec. 6); that mere notification on order bills has no effect on negotiability (sec. 7); that in case of loss of the bill of lading the title may be established by order of the Court (sec. 14); that attachment for debt shall be as on other property hard to reach (sec. 23); that order bills are negotiable by delivery "if specified on the bill 'to order of a specified person,'" who has indorsed in blank (sec. 27); that indorsement on an order bill makes it negotiable (sec. 28); that straight bills are transferable, but not free from equities, if accompanied by an agreement, expressed or implied, to pass title (sec. 29); that full legal title to goods is acquired through the bill of lading (sec. 31); that title on a bill transferred, but not negotiable, passes subject to agreement of transferor (sec. 32); and that when goods have been sold and an order bill appears in the hands of an innocent purchaser for value, it is good against the carrier (sec. 38). Under these provisions the title to goods, of which the bill of lading is a legal representative, may, under any condition and at any time, be traced as definitely and readily as in the case of other legal instruments.

A very great deal was said in the hearings on the Pomerene bill about making the bill of lading more worthy of its position as an

important commercial document by means of an increase of its negotiability. Says one witness, Mr. Sol. Wexler, vice-president of the Whitney Central National Bank, New Orleans, La.:

> I maintain that the business of the world, not only of the United States, but of the whole world—as it is done today—is done largely upon bills of lading, whether "to order" or "straight"; that it has become the most important instrument of credit, in use in the world today, of any kind; and that it is necessary for the commerce of this country to make that bill of lading fully negotiable, entirely safe, and to make the person who receipts for the goods, whether they have been delivered to him or not, responsible for their delivery. . . . . All we are asking of this bill of lading is to protect the innocent holder of the document.[1]

And also, as phrased by Mr. Francis B. James, the leading advocate:

> An order bill of lading is commodity currency, and is doubly so when accompanied by a draft—the draft with its dollar mark representing the unit of value and the order bills of lading a unit of quantity. By the use of a negotiable order bill of lading, properly protected by legal sanction, our great staples and other commodities are turned into a part of the asset currency of the country.[2]

As illustrated by these quotations, two main requests stand out from the discussion. One is that the liability on bills of lading be readily ascertainable from those instruments themselves, and the other is that the bills be made more fully negotiable. Incidentally it is suggested that the liability be defined, so as to hold the carrier more fully than formerly. This position would be enough in itself to range the shippers, receivers, and bankers on one side of the question. But these two points are not independent of each other. Clearly defined liability on the part of a responsible party is an essential to free negotiability. Therein may lie another reason for holding the carrier to more extended liability.

Something further needs to be said about the negotiability of the bill of lading. Extravagant and not well-considered statements have been made on the subject. "The bill of lading," wrote President Hadley years ago, "is made to serve the same purpose as a bill of exchange."[3] "The [order] bill of lading thus contributes to that fluidity of the circulating medium, that celerity in the

[1] Hearings, p. 40.

[2] *Ibid.*, p. 55.

[3] *Railroad Transportation*, p. 58.

transfer of merchandise, which are striking achievements and essential requirements of current civilization."[1] "Bills, drafts, notes, checks, and bills of lading are in fact and practice parts of the currency of commerce."[2] "A negotiable order bill of lading ought to be as clean as a check, draft, or promissory note."[3] What specifically can these utterances mean? Apparently the idea that lies behind them is that bills of lading may be made into a new kind of currency of commerce, so that along with checks, drafts, and promissory notes they may save "the necessity of the large concentration of money to handle and move the staple commodities of the country."[4]

Such a service is demonstrably impossible. Not only are bills of lading representative of a unit of quantity, of a certain amount of certain commodities—and commodities for obvious reasons can never again become a universally acceptable medium of exchange—they also are not used, or intended to be used, as a medium of exchange, as the currency of commerce in any true sense. Negotiability, as used in relation to bills of lading, does not, or should not, imply making them serve the purpose of bills of exchange. The distinction was correctly stated, though for a different purpose, by W. W. Porter many years ago:

> A large number of dicta have been uttered by eminent authorities in assertion of the negotiability of the bill of lading, but no case can be found, unless arising under a special statute, in which a bill of lading has been treated as an instrument which is negotiable in the same sense as bills of exchange and promissory notes are negotiable. All broad assertions of the negotiability of the bill of lading, when examined in the light of their context and of their actual application to the very cases in which they were unguardedly made by the Court, will be found equivalent merely to a statement that the bill is transferable by indorsement and delivery and that such indorsement and delivery transfer to the indorsee or holder such rights to, or property in, the goods as it was the intention of the parties, gathered from all the circumstances, to pass.[5]

Bills of lading are not currency any more than mortgages and deeds and warehouse receipts are currency. They are collateral

[1] McPherson, *op. cit.*, p. 190.

[2] *American Uniform Commercial Acts*, p. 56.

[3] *Ibid.*, p. 20.

[4] Hearings, p. 15.

[5] *The Bill of Lading*, pp. 79–80.

security and nothing more. Nor will it ever be possible for them to meet the requirements of the true negotiable instrument.

> An instrument to be negotiable must conform to the following requirements: (1) it must be in writing and signed by the maker or drawer; (2) it must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.[1]

Requirement (2) makes the vital and essential distinction between bills of lading and bills of exchange or promissory notes. And a use of the words "currency of commerce" in connection with bills of lading or a classification of them indiscriminately with checks, drafts, and notes is confusing and misleading.

The Pomerene law has not, therefore, made the bills of lading "currency of commerce," or capable of taking the place of bills of exchange. It has, however, done a great and good service; it has clearly defined the responsible parties in the shipment contract and thereby has made the bills of lading more readily acceptable as collateral security for loans by means of bills of exchange. This is true both for "order" bills and "straight" bills; and this was and should have been the essential purpose of the law. The negotiability of order bills readily follows under the provisions permitting transfer of title.

But in extending the liability of the carriers something else also resulted. The carriers were forced to become a kind of "guaranty trust company." In practice, bills of lading are not made out by the carrier's agents in the vast majority of cases.

> Today I think it is no exaggeration to say that not one bill out of a thousand—and I believe I could say 10,000—is made out by the agent of the railroad company. The business of this country could not move for a single day if the bills of lading were not made out by the shippers. It is not merely a question of the number of agents or the size of the platforms to hold freight, but it is a question of time. There are not enough hours in the day, and there is not enough space in the streets of any large city adjoining the terminals of railroads, to accommodate the drays and wagons. . . . . That bill of lading

[1] *Uniform Negotiable Instrument Law*, sec. I.

is checked with the goods, if there is time. If there is not time, it is checked with the shipping order. . . . . The main object in life is to get rid of that drayman.[1]

This law compels responsibility by the carrier on bills filled out by the shippers, hastily checked by the agents of the carriers, and then signed. Bills of this character are to be raised to a plane of unquestioned reliability. The railroads claim, and with a very sensible show of justification, that a careful checking up on these bills is necessary for such liability; that this is a new and expensive service not included in the present rates charged; and that an added recompense is due them for it.

The Pomerene law, then, has favored the shipper, the receiver, and the banker by giving a better kind of collateral security, upon which bills of exchange are more confidently drawn and more readily accepted. This has certainly facilitated commerce, has made bills of lading better commercial paper. At the same time, in extending the liability of the carriers, it has compelled them practically to guarantee the integrity of shippers who make out their own bills of lading and to be responsible for the acts of all their agents, near and far, high grade and low grade, contrary to the decision in the Friedlander case. Furthermore, it has declared the negotiability of order bills and the transferability of straight bills. The broad lines of liability are thus uniformly laid down.

IV

The other phase of uniformity—the conditions of the contract of shipment between shipper and carrier—still remains. As has been indicated before, here is a direct clash of interest. The only way out is through a compromise. The question has been fully presented to the Interstate Commerce Commission. The main points of the opposing contentions will be presented here, and their bearing upon the general problem of uniformity will be shown.

The contentions by these two parties are best presented by a copy of the conditions of the uniform bill of lading with the suggested changes.

[1] Hearings, p. 101, testimony of H. L. Bond, general counsel of the Baltimore & Ohio R.R.

The demands of the carriers may be summarized under seven heads: (1) relief from responsibility for discrepancies in weights of certain commodities, such as "grain, seeds, or other commodities"; (2) the distinction to be made clearly between carrier and warehouseman function, with a corresponding distinction in liability; (3) the use of open cars, due either to "general custom," "nature of property," or order of shipper, shall entail liability only for negligence (except in case of fire); (4) the amount of loss or damage is to be computed on the basis of actual value of the property at the place and time of receipt; (5) forty-eight hours after arrival and notice to consignee is a reasonable length of time for the carrier liability to extend, beyond that limit care of the goods is a warehousing function; (6) where no regular freight agent is located, the goods delivered to or received from sidings, wharves, or landings are at the shipper's or consignee's risk, except for negligence of carrier; (7) where goods are carried by water all or part of their journey, unless diverted by the carrier, they entail the customary exemptions from liability, as on ocean commerce.

The shippers, on the other hand, want the following conditions: (1) that the carrier's liability as a common carrier be terminated only "as provided by law;" (2) that property not usually carried in open cars shall be so carried when the shipper orders it, at the owner's risk for damage arising as a direct cause of being so shipped, if the carrier has used reasonable care; but that loss by fire holds the carrier as fully liable as if the goods were carried in closed cars; (3) that the amount of loss or damage to property shall be the full actual loss, including freight charges, if paid, at the time and place of loss or damage; (4) that the determination of the time when the carrier, having transported the goods, ceases to serve in that function and becomes a warehouseman shall be determined by the circumstances of the case; (5) that the carrier shall be held continuously to full liability, even though the goods travel a part or all of the way by water.

These are the opposing contentions over the conditions of the shipment contract in the straight and order bills of lading. They are the remaining obstacles to the desired twofold uniformity, i.e., of the conditions of the contract and of the law of bills of lading, so

far as the two kinds are concerned. There remain other questions on the export bill of lading, on the livestock bill of lading, and on the proposed coal bill of lading. But since the differences of interests in those bills of lading must be settled upon the same principles that underlie the adjustment in the case of straight and order bills, they have not entered into this discussion.[1]

A survey of this clash of interests will reveal the broad principles upon which adjustment must be made. The compromise that is necessary must be based on the rule of reasonableness, and reasonableness in this case means a clear understanding of functional service and a fair return upon that service. Back of the whole controversy is the consideration that the bill of lading is a special contract of shipment, whose purpose is "to modify the liability which would exist at common law."[2] The shipper is free to elect to ship under common law or on the bill of lading.[3] In return for the limitation of liability under the bill of lading the carriers offer a reduced transportation charge of 10 per cent (formerly 20 per cent). If the bill of lading is issued, it moves under the provisions of the Pomerene law. And on the background of these considerations the contestants have appealed to the Interstate Commerce Commission as to the justness and reasonableness of their claims.

The whole case seems to simmer down to this: (1) Where is the point in the process of transportation, at the point of receipt, *in transitu*, and at destination, that the common carrier serves merely as a warehouseman or as both a common carrier and a warehouseman? (2) Must the carrier assume the full liability of a common carrier and a warehouseman, even though it does not offer the equipment or facilities to serve in both capacities? (3) Shall the ancient custom of limited liability on the water routes be abolished? (4) Shall the "actual value" of the goods lost or damaged be determined by their value at the time and point of shipment or at the time and point of loss or damage? The decision of the Commission must cover these points. Their pronouncement is awaited with much interest and concern.

[1] The contentions on these commodity bills are fully set forth in the briefs of the carriers and shippers.

[2] Carrier's Brief, p. 10.

[3] Cf. sec. 8, Pomerene Law.

V

This survey of the uniform bill of lading question has shown the development of the movement for uniformity and the progress that has been made in it. An attempt has been made to identify the essential issues of the controversy, to show how far adjustment has been achieved, and what still remains for adjudication. The bill of lading "as a piece of commercial paper" has been analyzed, and its functions in the transportation process defined. Certain vagueness and confusion in terminology of those discussing this important commercial document has been examined.

It may be deduced from these considerations that the bill of lading can never become a negotiable instrument "ranking on a par with a bill of exchange," because their functions are different in character and because the word "negotiability" cannot be applied in the same sense to both of these instruments. Furthermore, it seems clear that three different functions have been concentrated in this bill of lading—namely, to act as a receipt, as a contract, and as a document of title to goods—and that the movement for uniformity, by extending the carrier's liability, has added a fourth as a guaranty of the shipper's integrity to the banker and the consignee. That these functions are merged one into the other by practical considerations is also manifest. Some careful thinking and some clear reasoning will be needed to disentangle them. And shooting through all these problems is the practical issue—traffic must move. It is that issue which sets the bill of lading apart from other similar documents, such as deeds, mortgages, and warehouse receipts, important as they are.

And, lastly, this discussion has revealed the great importance attached to the bill of lading as collateral security. Where the bill of exchange, with documents attached, moves "documents against acceptance," the bill of lading assumes transcending importance; it must be unquestionable security. This is true in both domestic and foreign trade.

This piece of commercial paper, issued annually to an extent that represents twenty-five billion dollars worth of commodities, is a commercial instrument worthy of much serious consideration.

"The bill of lading is an instrument for facilitating commerce, the importance of which is not generally known."[1] It will never fully come into its own until all controversies concerning interpretation, responsibility, and liability are adjusted. Toward this adjustment great strides have been made. All interested parties have been heard; the evidence is in; uniform laws are being adopted in one state after another; the "conditions" alone are under fire. The decision of the Interstate Commerce Commission on these disputed points is due.

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[1] McPherson, *op. cit.*, p. 190.